STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: October 25, 2013)

JEANETTE MASTRATI	:	
	:	
VS.	:	**C.A. NO. KC 12-0707**
	:	
THOMAS F. AHEARN, ADMINISTRATOR, DIVISION OF PUBLIC UTILITIES AND CARRIERS	:	

DECISION

RUBINE, J. Petitioner Jeanette Mastrati appeals from a final order of the Division of Public Utilities and Carriers, which partially upheld National Grid retroactive billing of the Petitioner for a period of eleven years. For the reasons set forth in this Decision, this Court reverses the order of the Division and remands to the Division for entry of an order consistent with this Decision.

I

Facts & Travel

Petitioner Jeanette Mastrati (Mastrati or customer) owns and operates a business known as "Resale Connection" at 330 Atwood Avenue, Unit A, in Cranston, Rhode Island. Beginning in March 2008, National Grid (National Grid or utility) and its predecessor gas utilities billed Mastrati an amount of $12,488.60[1] for alleged undercharges for natural gas consumption spanning eleven years which National Grid claims was the result of faulty meter data transmission which did not accurately reflect actual gas usage, but registered gas usage in

[1] Mastrati was originally billed for $16,689.17, but National Grid ultimately adjusted that amount downward to $12,488.60 as a result of several errors.

amounts less than that which was actually consumed. It is from these charges that Mastrati sought relief from the Division.

National Grid attempted to establish that Mastrati had been billed only for approximately fifty (50%) percent of her actual consumption of natural gas from December 29, 1997 to March 3, 2008. (R. at 162.) The utility only discovered this error when they deployed a technician to the property on March 3, 2008 and discovered that the electronic remote transmitter (ERT) was not synchronized to the meter. Providence Gas (allegedly, National Grid's predecessor) originally installed the meter on December 29, 1997, and Mastrati's bill was based on ERT readings from that date until the error was discovered in March 2008. Id. at 25-26, 258-59, 270.

On or about January 14, 2011, Mastrati filed a complaint with the Division of Public Utilities and Carriers (the Division) regarding a billing dispute arising from the utility retroactively billing for what it claimed was gas actually used but never previously billed to the customer. The Division agreed to conduct a formal examination that included hearings on March 29, 2011, and January 9, March 6, and April 16, 2012. Id. at 14. The Division thereafter made findings of fact and rendered a final decision on Mastrati's claim. This appeal to Superior Court followed in accordance with G.L. 1956 §§ 42-35-15 and 39-5-1.

Mr. Kevin Allsworth (Allsworth), an analyst in National Grid's Regulatory and Escalated Complaint Department, testified for the utility as to the manner by which the consumption of natural gas is determined. His testimony described how each customer's gas consumption is determined through a metering system composed of the meter itself and an ERT. The meter and ERT are owned by and installed by the utility. The meter measures the cubic feet of natural gas that flows through the meter. Id. at 373. The ERT is utilized by the utility to transmit this consumption data remotely. This allows the utility to capture the data in a "drive by" manner,

without the necessity of entering a customer's home or place of business to visually read the dials on the meter. Id. In order for the utility to obtain an accurate reading, the meter must be properly synchronized with the ERT.

National Grid did not attempt to qualify or present Allsworth as an expert witness. Allsworth testified to the contents of a report that National Grid presented as a business record, admissible under the business records exception to the hearsay rule. R.I. R. Evid. 803(6). The report indicated that the meter index at the time it was tested in March 2008 was reading "21,451" and that the ERT "was only reading 10,625." (R. at 268-69.) Allsworth testified that this disparity indicated that the meter was not accurately synchronized with the ERT, causing the predecessor utility to bill only for one-half the actual gas usage.

II

Standard of Review

Pursuant to § 39-5-1 of the Rhode Island Administrative Procedures Act (APA), "any person aggrieved by a final decision or order of the administrator may appeal therefrom to the superior court pursuant to the provisions of § 42-35-15." The relevant provision of the statute pertaining to review of an agency decision by the Superior Court provides in part:

> "The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, interferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Sec. 42-35-15 (g).

When reviewing an administrative decision under § 42-35-15, the Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Id. When more than one factual inference is possible, the Court may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are clearly erroneous. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980). However, questions of law are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts. In re Advisory Opinion to the Governor, 732 A.2d 55, 60 (R.I. 1999) (citing Carmody v. Rhode Island Conflict of Interest Comm'n, 509 A.2d 453 (R.I. 1986).

This Court is further limited in its review to an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision. Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). "Legally competent" evidence is '"such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.'" Foster-Glocester Reg'l Sch. Comm v. Bd. of Review, 854 A.2d 1008, 1012 (R.I. 2004) (quoting Rhode Island Temps, Inc. v. Department of Labor & Training, 749 A.2d 1121, 1125 (R.I. 2000)).

The Rhode Island Rules of Evidence provide the usual and most helpful standard for a hearing officer to use in adjudging the competency of evidence. DePasquale v. Harrington, 599 A.2d 314, 316 (R.I. 1991). Under § 42-35-10(a), the APA provides that "the rules of evidence as applied in the superior courts of this state shall be followed." The APA carves out a narrow exception for the use of evidence that would be deemed inadmissible under the Rules of

Evidence. The exception allows for the admissibility of otherwise inadmissible evidence if it is of a "type commonly relied upon by reasonably prudent men and women in the conduct of their affairs" when necessary to "ascertain facts not reasonably susceptible of proof" under the standard evidentiary rules. Id. The Rhode Island Supreme Court has allowed the hearing officer to "take into account evidence that would be excluded from a trial by jury if it would be "prudent to do so" under the constraints of the statute. DePasquale, 599 A.2d at 317.

III

Analysis

The Division based its decision on a series of eleven findings of fact outlined in the Report and Order. In order to affirm the Division's decision as to each material fact so found, the Court must determine if such finding was supported by competent evidence in the record. This Court believes that findings and material portions thereof of numbers one, two, and eleven are not supported by competent evidence on the record.

A

Findings One and Two

This Court believes that the Division's first and second findings are not supported by competent evidence. In those findings of fact, the Hearing Officer stated:

> "1. That meter # 408964, which was recording Ms. Mastradi's (sic) gas consumption at 300 Atwood Avenue, Unit A, in Cranston during the period in issue, specifically, December 29, 1997 through March 3, 2008 (10 years and 63 days) was operating within prescribed accuracy parameters.
>
> 2. That the evidence of record supports National Grid's assertion that the electronic remote transmitter (ERT) that was connected to meter #408964, though operating during the entire period in issue, was inaccurately transmitting the consumption data that was being recorded by meter #408964. The evidence also supports National Grid's assertion that the ERT that was attached to meter #408964 was transmitting consumption data that reflected only 50% of the Complainant's actual gas

> consumption during the period in issue. This finding is buttressed not only by the Company's business records, but also from the fact that the gas charges for Ms. Mastradi's (sic) unit . . . remained about the same after a separate gas meter was installed to service [her unit] in 2008."

(Report and Order at 45- 46.)

Finding number two, with respect to the inaccuracy of the transmission of reporting data, is derived only from the testimony of Allsworth and the report from an unidentified source, but not supported by properly qualified expert opinion. Without a properly qualified expert, any opinion which supports the finding of inaccuracy of the metering and the resulting finding that the faulty meters led to a fifty (50%) percent under-reporting of gas consumption over the relevant time period[2] constitutes opinion testimony from a lay witness and is not competent to support the Division's finding as contained in finding number two. Without the utility proving the facts and opinions drawn therefrom through introduction of competent evidence, the findings contained in both number two and number one are arbitrary, and the entire foundation of the Division's conclusion upholding the validity of the retroactive billing is flawed. Some portions of finding number two were supported by competent record evidence. For instance, there was record evidence to substantiate the finding that the ERT connected to Mastrati's meter (#408964) was recording that customer's gas usage. However, the Court believes that substantial portions of finding number two are not supported by competent evidence in the record; for instance, that the meters were operating within prescribed accuracy parameters. See analysis infra.

[2] Even if the Court believes it was proper for the Division to accept Allsworth's opinion testimony, there is no evidence that a meter found faulty in March 2008 was similarly inaccurate during the entirety of the billing period of December 1997 through March 2008. To adopt finding number one, the Hearing Officer would have to draw an inference not supported by Allsworth's testimony, or any competent evidence in the record.

The Division's findings concerning the accuracy of both the ERT and the meter were based upon opinion testimony of Allsworth, a lay witness, as to the proper multiplier to apply to accurately report gas consumption during the relevant billing period. Such a technical conclusion may not be proven through a lay witness, but is an opinion that may only be proven through the testimony of an expert witness. The Hearing Officer abused his discretion in allowing testimony that would be excluded under the rules of evidence as opinion testimony from a witness not qualified as an expert and that is outside the scope of the narrow evidentiary exception contained in § 42-35-10(a). As a result, the decision of the Division is unsupported by reliable, probative, and substantial evidence and must be reversed under §§ 42-35-15(g)(4) and 42-35-15(g)(5).

Allsworth's testimony concerning the calibration and testing of ERT devices to determine accuracy of natural gas consumption is "scientific, technical or specialized knowledge" and is therefore not a proper subject for lay testimony under R.I. R. Evid. 701. Therefore, this testimony must be presented by a witness who is "qualified as an expert by knowledge, skill, experience, training, or education." R.I. R. Evid. 702.

There is no evidence on record that supports the conclusion that Allsworth has such qualifications. The witness testified that he is an analyst in the National Grid's Regulatory and Escalated Complaint Department who "reviewed accounts" and "[went] through figures" regarding the case. (R. at 252, 388.) He did not testify to any special knowledge, training, or any other background that would support a qualification to testify as an expert regarding the analysis of consumption and ERT testing data and how such faulty metering leads to a specific finding as to the amount of underbilling. In fact, the Hearing Officer admitted that Allsworth was not testifying as an expert witness. Id. at 271.

On the contrary, the Hearing Officer admitted Allsworth's testimony over objection because he believed it was supported by company records which qualified under the business records exception to hearsay under R.I. R. Evid. 803 (6)(b). In support of allowing this testimony, the Hearing Officer stated, "This is a witness reading from company records which are required under the Division's rules to be kept for, I believe, 15 years and that's what he's doing. He's simply referring to a record that the company is obligated to keep for 15 years." (R. at 270-71.)

This is untrue. Throughout his testimony, Allsworth far exceeded the scope of factual testimony contained within company records. See, e.g., R. at 268-69, 371, 377, 386-87. He regularly answered technical questions posed by the Hearing Officer and offered opinion testimony drawing technical conclusions based on company records that could only be introduced through a properly qualified expert. Allsworth often testified as fact that which, in actuality, was his opinion, or an opinion contained in the "business record" from which his conclusive testimony was derived. As a result, his testimony lacked the necessary foundation for opinion testimony, and must be considered inadmissible expert opinion from a lay witness.

The analysis does not end here. Under § 42-35-10(a), the APA provides that inadmissible evidence may still be properly admitted in an administrative proceeding. However, this evidentiary exception does not permit a hearing officer to accept opinion evidence from a lay witness or a business record on an issue only susceptible to proof by an expert qualified as such.

It would seem reasonable to require proof of facts relating to the calibration and diagnosis of a gas meter through the testimony of an employee who works in the appropriate field. There is no evidence on the record that National Grid could not produce a technically qualified witness to testify as an expert, as this Court believes an expert was necessary to establish the material

facts underlying the utility's response to a customer's disputed billing. National Grid simply did not seek to prove such conclusions through the introduction of a properly qualified expert. Thus, the Hearing Officer abused his discretion in relying on opinion testimony offered by a lay witness and reading from a report that was not prepared by a qualified expert. The Hearing Officer's finding was supported only through the opinion testimony of a lay witness who drew conclusions from a report never proven to have been prepared by a qualified expert. This appears to be fundamentally unfair to the complaining customer, in that her counsel was denied the opportunity to cross-examine an expert witness offering a conclusory opinion on what was the determinative conclusion reached by the Division, thus constituting a final agency decision characterized by abuse of discretion or a clearly unwarranted exercise of discretion. Sec. 42-35-15(g).

The majority of Allsworth's testimony concerning the alleged inaccurate consumption data revolved around a note, apparently made by an unidentified technician, in the company business records. The note simply read: "ERT program with 5-foot drive instead of 10-foot drive in error. Customer billed for only half usage since 1997." (R. at 372.) The Hearing Officer admitted this note over objection by reasoning that it fell within the business records exception to the hearsay rule under R.I. R. Evid. 803(6).

The note cannot possibly be admissible as opinion when the author was not identified and certainly not found to be an expert qualified to offer opinions in the form of conclusions as contained in the records. This Court cannot know if the author made the notation "at or near the time [of diagnosis] . . . by someone with knowledge" or what method and circumstances surrounded the notation. R.I. R. Evid. 803(6)(a). The Hearing Officer did not comment on any distinction between fact and expert opinion.

Nor does the Court find that the Division's consideration of the conclusions set forth in this note is consistent with the APA's more liberal evidentiary standard to be applied at the hearing of a contested case under the APA because no reasonably prudent person would rely on it to ascertain fact not reasonably susceptible of proof.

Allsworth's testimony concerning company records cannot be considered legally competent evidence to support the conclusion that an ERT only registered fifty (50%) percent of natural gas consumption from December 29, 1997 to March 3, 2008, when he only reviewed company records regarding three of those years in question and when the opinion has as its basis a test performed in March 2008. The March 2008 test was accepted as proof that the meters malfunctioned similarly during the entirety of the prior eleven years. In response to a question on cross-examination, Allsworth stated that he had only reviewed company records beginning in 2005.

> "Q: And at no time during those ten plus years did any employee or agent of the gas company go in and [visually check the dials] to check the accuracy of data transmitted by [the ERT]?
> A: The records that I reviewed go back to 2005, so I can't speak to before that, but nothing since 2005 that I'm aware of no."

(R. at 382.)

The witness continued to testify that he had no knowledge of the circumstances surrounding the meter's installation in 1997, "whether the meter was new at the time, whether it came [with an attached ERT] or whether it was programmed by somebody else." Id. at 370.

Even if the evidence proffered by Allsworth were considered competent, which this Court believes is not the case, it would only support a more narrow finding that the ERT was transmitting fifty (50%) percent consumption data on March 3, 2008. Any testimony offered by

this witness regarding the dates between 1997 and 2005 is not based on his personal knowledge and should have been ignored by the Division.

The Hearing Officer's reliance on the conclusory opinions contained in company records provides further support for the reversal of the Division's finding under § 42-35-15 (5) and (6).

B

Finding Eleven

The Division's eleventh finding is also unsupported by competent evidence in the record. In finding number eleven, the Hearing Officer stated:

> "The Division finds that National Grid has domain over all the assets and debts, including the collectibles, associated with its predecessor gas companies, and therefore, rejects the Complainant's argument that National Grid has insufficient legal standing to pursue collectibles predating National Grid's business entrance in Rhode Island."

(Report and Order at 48.)

There is a complete absence of evidence on the record that would support the Division's finding that, "National Grid has domain over all the assets and debts, including collectibles [receivables]," of predecessor gas companies Providence Gas or Southern Union.[3] Such a finding is unsupported by competent evidence and is therefore a finding that is "arbitrary and capricious" and an "abuse of discretion" under § 42-35-15(g)(4) and (5), and a decision based thereon must be reversed.

Asset and stock purchases between utility companies are subject to § 39-3-24. The statute allows utility companies to purchase or lease particular assets from another with the consent and approval of the Division. When particular assets are purchased, the purchasing company may "exercise and enjoy all of the rights" associated with those assets. Sec. § 39-3-

[3] Also referred to on the record as "New England Gas." Id. at 290-91.

24(2). Alternatively, a utility company may merge with another, "provided that the merger or sale or lease of all or substantially all of its property, assets, plant and business" when authorized by "a vote of at least two-thirds (2/3) . . . of its stockholders." Sec. § 39-3-24 (3). Under G.L. 1956 § 7-1.2-1001(a), a merger becomes effective upon the "issuance of a certificate of merger by the secretary of state." Subsequently, the surviving or new company will hold domain over all of the rights, interests, debts and liabilities under subparts (b)(2) and (b)(3) of that statute.

National Grid presented no evidence on the record supporting any such asset purchase, stock purchase, or merger between or among it and its predecessor gas companies. In particular, there is no evidence presented to support the conclusion that National Grid had standing to pursue collection of receivables for any of its predecessor utility companies. In his testimony presented on behalf of the utility's opposition to Mastrati's complaint, Allsworth testified that he "had no idea" whether National Grid made stock or asset purchases from predecessor companies. (R. at 290-91.) There is similarly an absence of any documentary evidence that would support a finding that National Grid acquired its interests in the predecessor utilities by asset purchase, stock purchase, or merger between National Grid and either of its predecessors.

The Division's finding appears to rely solely on National Grid's rebuttal that it '"didn't even know the issue [of standing] was in dispute' . . . but 'has assumed the liabilities of Providence Gas'" and would provide legal proof if the Division so required. (Report and Order at 54.) While the Hearing Officer requested that National Grid proffer evidence supporting its assertion of its right to collect receivables arising from adjustments to bills originally rendered by its predecessor, he failed to require that the company provide any "legal proof" that they had the right to collect accounts receivables previously arising from the operation of the predecessor utilities. Id. at 61-69.

With respect to Mastrati's utility service, National Grid may only exercise the rights and privileges it acquired from any predecessor company. While anecdotally the Hearing Officer may have independent knowledge of the corporate succession with respect to gas utilities in Rhode Island, each fact relied on by the Hearing Officer must be supported by evidence in the record. There is simply no evidentiary basis for the Hearing Officer to have made this finding. Without a showing that National Grid has the right to pursue collection from Mastrati of natural gas provided to her by predecessor utilities, there can be no presumed right to collect.

Thus, the Division's findings contained in finding number eleven is central to the outcome of this case and was not based on competent evidence.

IV
Conclusion

Therefore, this Court finds support for the reversal of the Division's decision consistent with § 42-35-15 and the reasoning of this decision for the following reasons:

1. There is an absence of competent evidence with respect to the findings of a technical defect in the metering which allegedly resulted in a fifty (50%) percent underbilling for gas actually used by the customer with normal billing practices and also the findings with respect to National Grid's standing to pursue collection of a receivable for natural gas allegedly provided by companies other than National Grid.
2. The Division's conclusions were based on material findings unsupported by competent evidence in the record and, thus, the final Division decision was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

This Court therefore reverses the decision of the Division, and the matter is remanded to the Division with instructions to enter its order consistent with this Decision and requiring

National Grid to cease its efforts to pursue collection from Mastrati for gas usage for the period from December 29, 1997 through March 3, 2008, for sums it alleges were the result of previous underbilling for natural gas used by the customer but which went unrecognized for billing purposes due to defective synchronization of the meters provided to her by National Grid or predecessor gas utilities serving her business location at 330 Atwood Avenue, Unit A, Cranston, Rhode Island and to consider Mastrati's account paid in full for that period.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Mastrati v. Ahearn, Administrator, Division of Public Utilities and Carriers**
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COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**October 25, 2013**
JUSTICE/MAGISTRATE:	**Rubine, J.**
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